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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 245

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION, SOLE,

Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, ET AL.

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Appellant respectfully petitions for a rehearing of the order of this Court made on October 10, 1949, dismissing appellant's appeal in the above-captioned case for want of a substantial federal question.

Time within which this petition for rehearing might be filed was extended (by order of October 22, 1949) until December 1, 1949.

Under the guidance of this Court's decision in *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 105, and *Millhein*

v. *Moffat Tunnel District*, 262 U. S. 710, 716, we may assume that this Court ruled that the federal question is not substantial because either:

(1) obviously without merit; or

(2) previous decisions of this Court so clearly show its unsoundness as to leave no room for controversy.

We respectfully submit that the Court erred respecting whichever of the above items was the basis for its order. We respectfully submit that this Court has somehow overlooked the very substantial nature and the seriousness of the question on appeal in this matter.

The question is one of the most grave and serious concern to petitioner and other religious denominations. If the right to build a church and worship in it can be denied or conditioned by a state under the federal Constitution, such novel exercise of the police power reasonably requires full inquiry by this Court. This case presents an assertion of right by a municipality to prohibit a church from using its own land for religious purposes—a most serious restriction of the freedom of religious worship. This petition for rehearing is submitted, therefore, so that your petitioner, as well as other parties who would be affected by this Court's order may (upon vacation of the order of dismissal and the notation of probable jurisdiction or postponement of the question of jurisdiction to the merits) submit briefs to the Court on the merits.[1]

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[1] Briefs on behalf of the Roman Catholic Archbishop of San Francisco, the Protestant Episcopal Church Bishop of California, and of the Bishop of the Protestant Episcopal Church of Los Angeles, California, were filed as *amici curiae* in support of a petition for hearing in the Supreme Court of the State of California.

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I

The Federal Question Is Not "Obviously Without Merit"

A. *The Decision of this Court in Effect Erroneously Permits Municipalities to Prohibit Religious Worship in Churches in Residential Sections of the City, Contrary to the Principles of this Court's Decisions in* Marsh *v.* Alabama *and* Murdock *v.* Pennsylvania.

Churches are the traditional and historic place for religious worship. The effect of the order of this Court is to permit municipalities to prohibit traditional religious worship in the residential sections of municipalities—the building of a church and meeting in it for worship. This result is reached in spite of previous decisions of this Court in which it has indicated in no uncertain terms that other forms of religious worship—evangelical preaching or distribution of religious tracts or literature—cannot be prohibited in *any* part of a city. We refer to the following decisions of this Court, which diligently protect the constitutional guaranty of freedom of religious worship in the form of evangelical preaching against municipal ordinances which would prohibit or stultify such guaranty. Thus, *Marsh* v. *Alabama,* 326 U. S. 501, 504-505:

> "Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant's conviction must be reversed. Under our decision in Lovell *v.* Griffin, 303 U. S. 444, and others which have followed that case [citations of many cases in footnote omitted], neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalk and public places or make the right to distribute

> dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds legal title to them. Jamison *v.* Texas, 318 U. S. 413. And we have recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not, without jeopardizing that vital individual freedom, prohibit door to door distribution of literature. Martin *v.* Struthers, 319 U. S. 141, 146, 147. * * *"

See also *Murdock* v. *Pennsylvania,* 319 U. S. 105, 110, *et passim.*

If evangelical preaching and the distribution of religious tracts and literature may not be prohibited in the residential districts of the City of Porterville by reason of the constitutional guaranties of the protection of religious worship, how then can the more conventional form of religious worship in a church be barred from such districts?

This Court has not indicated that door-to-door evangelical preaching is entitled to a higher degree of protection than that accorded the more conventional forms of religious worship in churches. To the contrary, it has indicated that all forms of religious worship are entitled to the same protection. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108-109:

> "The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. [Footnote citations omitted.] It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. [Footnote citations omitted.] It is more than preaching; it is

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more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. . . ."

An ordinance that would prohibit building and using a church within the city limits of Porterville, we submit, would be clearly unconstitutional as violative of the constitutional protection. It would be a striking down of the form of worship most favored by our culture and what is regarded by substantially all of the people as the conventional instrument of religious worship. The challenged ordinance accomplishes just that for a substantial part of the city. The ordinance under attack prohibits churches in any except the least desirable residential districts and relegates churches to less-favored locations with such semi-commercial uses as automobile stage stations, telephone exchanges, private clubs, police stations, etc. The difference between complete prohibition and the small concession here allowed differs, as this Court has ruled, "only in degree". *Murdock* v. *Pennsylvania, supra,* at p. 117:

> "The ordinance is not narrowly drawn to prevent or control abuses or evils arising from that activity. Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city-wide in scope (*Jones* v. *Opelika*) are different only in degree. Each is an abridgement of freedom of press and a restraint on the free exercise of religion. They stand or fall together."

And see *Schneider* v. *State,* 308 U. S. 147, 163:

> "It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited

to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

B. *The Ordinance On Its Face Restricts the Freedom of Religious Worship, Which Freedom Is Accorded a Higher Degree of Protection Than Is Accorded the Protection of Property Rights Under the Fourteenth Amendment.*

Respondents in their motion to dismiss, in an obvious attempt to evade the constitutional issue, suggest that the complaint does not sufficiently raise the constitutional question. It is claimed that the constitutional provisions relied upon were conclusions of law. It is, of course, sufficient that this Court in its order took no account of such a ground. Every fact necessary to raise the constitutional question was alleged. The constitutional provisions relied upon were recited in the complaint for the purpose of bringing to the attention of the Court the constitutional challenge.

Briefly, the petition presents the following facts:

In Paragraph I, the appellant is identified as a corporation sole, organized under the laws of Utah, qualified to do business in California, and to construct and maintain a church for religious worship in Tulare County, California.

In Paragraph II, defendant City of Porterville is identified as a municipal corporation, and defendants Ross Gardner and Harold Coulthurst, as building inspector and city manager, respectively, of the City of Porterville. It is alleged that since October 26, 1947, defendant Gardner has been building inspector and prior to that, one Robert Thomas was building inspector.

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In Paragraph III it is shown that appellant has been since March 19, 1945, the owner of certain described real estate in Tulare County, which real estate was on or about October 23, 1945, taken into the corporate limtis of the City of Porterville.[1]

In Paragraph IV, appellant showed that it duly filed with the defendant city, the city manager, and the building inspector an application to erect a church for religious worship upon its property, and that accompanying said application were plans and specifications and the required fee, in all respects conforming to the requirements of the defendant city's Building Code. It is alleged that although appellant did not specifically mention and request issuance of a certificate for use and occupancy, such request was made and implied in the application; and that a request for such issuance would have been futile and useless in that defendants would have refused to issue such a certificate even if the application had specifically mentioned a request for the issuance of a certificate, since defendants conceived it was mandatory upon them not to issue a permit for the construction, use and occupancy sought, and so advised the appellant; that appellant did all required as prerequisites to the issuance of a permit to erect a church.

In Paragraph V, it is shown that the defendant building inspector refused to issue a permit for the erection of a church and still refuses to do so, and returned to the appellant the plans and specifications.

In Paragraph VI, it is shown that the reason given by the defendants for refusing to issue the permit was that the property was zoned solely for the erection of single family dwellings. A copy of the City of Porterville Ordinance No. 383, the applicable zoning ordinance, is attached to the peti-

[1] It was stipulated at the hearing that part of the property was inside and part was outside the city limits at the time acquired by appellant (Rep. Tr. p. 816-20).

tion. Also, by stipulation at the hearing, there was attached to the petition a copy of the zoning map (Rep. Tr. p. 84).

The copy of the zoning map disclosed the exact areas affected by the ordinance and it appears from said map that a person residing on the western boundary of Zone 1 would be required to travel over half the width of the City of Porterville to reach a zone in which a church can exist under the terms of the ordinance.

Thus, there was alleged not only the ownership of the property and the pleading of the ordinance, but also that the property was zoned in an area where churches were restricted, that petitioner was the owner of the property and had applied for permission to build a church and that the petition was denied upon the ground that it was prohibited by the ordinance under attack. There was thus presented and pleaded and admitted by the demurrer the prevention of petitioner building a church on its property by reason of the ordinance.

The provisions of the ordinance as applied, absolutely prohibiting the erection of churches for religious worship in the preferred residential sections, was thus challenged.

Let us view this restriction in the light of general common knowledge.

The church is the traditional house of worship for Christians. It is the recognized instrument for the more conventional preaching of religion. It has been indicated by decisions of this Court that an evangelical preacher would have the right to preach or distribute religious tracts in any part of the City of Porterville. It would seem to follow then that the prohibition of a church, the conventional place and instrument of religious worship, is a direct and substantial restriction of the freedom of religious worship.

In considering whether there is presented a substantial federal question, there must not be overlooked the basic

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and fundamental distinction between the question of due process as applied to the protection of commercial enterprises and the question of due process as applied to the protection of the fundamental right of religious freedom or free speech. This Court heretofore always has accorded a far higher degree of protection to the fundamental rights, such as religious freedom, as compared with property rights. These fundamental rights which are guaranteed by the First Amendment (which by its terms imposes restrictions upon the power of Congress) are part of the liberty protected by the Fourteenth Amendment against deprivation by the states. This proposition has been established for the past 25 years.

Gitlow v. *New York*, 268 U. S. 652 (1925);
Whitney v. *California*, 274 U. S. 357 (1927);
Stromberg v. *California*, 283 U. S. 359 (1931);
Grosjean v. *American Press Co.*, 297 U. S. 233 (1936);
DeJonge v. *Oregon*, 299 U. S. 353 (1937);
Herndon v. *Lowry*, 301 U. S. 242 (1937);
Lovell v. *Griffin*, 303 U. S. 444 (1938);
Schneider v. *State*, 308 U. S. 147 (1939);
Cantwell v. *Connecticut*, 310 U. S. 296 (1940);
Bridges v. *California*, 314 U. S. 252 (1941);
Jones v. *Opelika*, 316 U. S. 584 (1942);
Murdock v. *Pennsylvania*, 319 U. S. 105 (1943);
Martin v. *Struthers*, 319 U. S. 141 (1943);
Board of Education v. *Barnette*, 319 U. S. 624 (1943);
Follett v. *McCormick*, 321 U. S. 573 (1944);
Prince v. *Massachusetts*, 321 U. S. 158 (1944);
Marsh v. *Alabama*, 326 U. S. 501 (1946);
Sala v. *New York*, 334 U. S. 558 (1948).

And showing that these fundamental rights are accorded a far higher degree of protection than the rights of the

marketplace, see *Board of Education* v. *Barnette*, 319 U. S. 624, 639:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibition of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restrictions only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

And holding that the right of religious freedom is above and distinct from the right to engage in business as a retailer of goods, see *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110-111, and in addition the following language:

> ". . . This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press. . . . [p. 109]
> "The fact that the ordinance is 'nondiscriminatory'

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> is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position." (p. 115).

And as stated in *Marsh* v. *Alabama*, 326 U. S. 501, 509:

> "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." (Citing *Jones* v. *Opelika; Murdock* v. *Pennsylvania* and *Follett* v. *McCormick*, supra.)

C. *The Challenged Ordinance Prima Facie Presents a Substantial Question of Violation of Section 1 of the Fourteenth Amendment. The Ordinance Does Not Meet the Test of Constitutionality Which the Law Imposes, Namely, That It Be Necessary to Prevent a Clear and Present Danger of Serious Substantive Evil That Arises Far Above Public Inconvenience, Annoyance or Unrest.*

The rule that municipal ordinances merely expressing the police power of the state will be presumed valid does not apply when the subject matter of the ordinance deals with one of the fundamental freedoms guaranteed by the First and Fourteenth Amendments. Indeed, not only does this presumption not apply, but when the ordinance imposes restrictions upon a fundamental liberty guaranteed by the First and Fourteenth Amendments, as hereinabove mentioned, a contrary presumption arises and the ordinance will be sustained when and only when there is a showing of absolute necessity to protect the public against a "clear

and present danger of a serious substantive evil that rises far above public inconvenience, annoyance and unrest". Only such a necessity will justify a restriction upon one of the fundamental freedoms. The quotation just made is taken from *Terminiello* v. *Chicago*, 337 U. S. 1, 4, based upon opinions of this Court in *Bridges* v. *California*, 314 U. S. 252, 262, and *Craig* v. *Horney*, 331 U. S. 367, 376. The proposition has been announced and repeated by numerous decisions by this Court. *Thomas* v. *Collins*, 323 U. S. 516, 530:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, *cf. De Jonge* v. *Oregon*, 299 U. S. 353, 364, and therefore are united in the First Article's assurance. *Cf.* 1 Annals of Congress 759-760."

And in *Marsh* v. *Alabama*, 326 U. S. 501, 509:

> "When we balance the Constitutional rights of owners of property against those of the people to

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> enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights.'"

Is the presence of a church in a residential section inimical to the public good, presenting evil rising far above inconvenience, annoyance or unrest? We believe that religious worship in residential areas of the city, rather than being an evil to be prohibited, is something good and a blessing to be nurtured. We believe that religious worship is intimately connected with the home life of all the people and should be considered as an adjunct of the home and of the family. The relationship between the church and home was recognized by the Supreme Court of the State of California in *Miller* v. *Board of Public Works,* 195 Cal. 477,

> "With ownership comes stability, the welding together of family ties and better attention to the rearing of children. With ownership comes increased interest in the promotion of public agencies, such as church and school, which have for their purpose a desired development of the moral and mental make-up of the citizenry of the country."

We attest our faith that in any view the federal guaranty forbids the state to class church building for religious worship with those limited cases which constitute "a clear and present danger of a serious substantive evil."

D. *The Zoning Ordinance Is Invalid Because It Has No Substantial Relation to the Public Health, Safety, Morals or General Welfare.*

If a religious organization is to be denied the right to build a church on its own property, the power to forbid such use of its property should be found somewhere. But the power of a municipality to enact zoning statutes finds its basis only in the police power of the state, and its authority stems only from the state's power to enact such measures as have a reasonable tendency to promote public health, safety, morals and general welfare.

Washington ex rel. Seattle Title & Trust Co. v. *Roberge*, 278 U. S. 116, 120;
Nectow v. *City of Cambridge*, 277 U. S. 183;
Cf. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395.

Does the elimination of churches from the most desirable and preferred residential districts of a city, and their relegation to the least desirable district, along with hotels, private lodge halls, private clubs, automobile stage stations, telephone exchanges, etc., serve any interest of public health? of public safety? of public morals? or of the general welfare? If it does not, then the ordinance is invalid because not a legitimate exercise of the state's police powers.

May we respectfully ask this Court wherein the assertion of the freedom of religion herein is frivolous or without merit? And where in any previous decision of the Court it is ruled that the exclusion of a church from residential sections of a city does tend to promote the public health? The public safety? The public morals? The general welfare? Is a church to be likened to commercial enterprises within the distinction which, as this Court quoted in the *Euclid* case (272 U. S. at p. 393):

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> ". . . furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregation need police protection. . . . Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. . . ."

If a church harbors mice, an old adage teaches us the church mouse is a "poor one", and not so substantive a threat to the public health or safety as to furnish the basis for denying the right to build a church on property owned by the church for religious purposes.

Appellant submits that far from serving the interests of public health, safety, morals or general welfare, the ordinance has the opposite effect and tends to defeat the general welfare, the very basis upon which such a zoning ordinance as is here involved, rests.

The basic philosophy behind the police power of a state to enact zoning ordinances appears to be briefly this: Justification for residential zoning in the last analysis rests upon the protection of the civic and social welfare values of the American home. Thus, separation of residential districts from commercial enterprises and establishment of single-dwelling, more desirable home residential districts, have this common fundamental purpose, to-wit, the protection of the home. But a restriction relegating churches to the least desirable districts of a city does not serve any purpose in the protection of the home. It has the opposite effect; for the church fosters the very thing that residential zoning seeks to protect, the social and moral values of the American home. The proper place for churches, therefore, is in home communities. The exclusion of churches from home districts and their

relegation to districts in which are tolerated public and semi-commercial institutions (R-4 Porterville zoning statute) is not based upon any purpose of protecting the home, but "to make exclusive districts more exclusive." (Bassett on Zoning, p. 72.)

The California court purported to see dangers to the public health, particularly to that of the youth of the community, in the more emotional type of religious worship prevailing in certain sects. If that danger be real, it would have greater application only in the more congested and less desirable districts where children are found in greater numbers and with less opportunity. But can a basis for discrimination between the residents in the least desirable district ~~to such fancied dangers~~ on the one hand, and residents of the more restricted districts be found which would deny the right to build a church in what otherwise would be contradiction of the federal guaranty?

And, further, if the lower court was correct in its supposition that religious worship in churches might endanger public health and welfare, then it might well be within the power of a legislature to abolish churches altogether. This, we submit, is foreign to human experience, and is utterly repugnant to the fundamental principles of law upon which our civilization is based. Those principles are so vital and so sacred that they are written into the Constitutions of both state and nation.

It is axiomatic and needs no citation of authorities that the phrase, "freedom of religious worship" means exactly what the words say; and individual worship need not conform to the pattern of what may be sober and enlightened religious thinking. If such speculation as was indulged in by the California court, totally unsupported by any factual background, could be a basis for the restriction of religious worship, there would be, indeed, little protection and comfort in the constitutional guarantees of freedom

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of religious worship, freedom of speech, and the other liberties of our Constitutions.

II

The Questions Involved Are Not Clearly Foreclosed by Earlier Decisions of This Court

A. *The Question Is One of First Impression Before This Court. State Courts Passing Upon Substantially the Same Question Have in All Instances, Save the Case at Bar, Held Against the Validity of Ordinances Having the Effect of Prohibiting Churches in Residential Sections of a City.*

So far as petitioner has been able to find, this Court has never decided the question whether a municipal zoning ordinance may validly prohibit churches in residential districts. Neither has appellee or the court below cited such a case. In a case where this point was involved in an ordinance under review, this Court expressly refrained from ruling on the question as not in issue, and it was thus indicated that the Court saw substance in the question.

The case referred to (which is one relied upon by appellees) is that of *Euclid* v. *Ambler Realty Company*, 272 U. S. 365. In it the Court had under consideration a zoning ordinance similar to the ordinance here involved. The ordinance was challenged as being in derogation of Section 1 of the Fourteenth Amendment. The party challenging the ordinance was the owner of a tract of land containing 68 acres. It was not alleged that there was a demand for any part of appellee's lands for churches. It also appeared that none of appellee's land fell within the class (U-1) restricted to single family dwellings and other enumerated uses. On this point the Court ruled (p. 385):

> "The record goes no farther than to show, as the lower court found, that the normal, and reasonably to

from the presence in the ordinance of those restrictio

be expected, use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal and reasonably to be expected, use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect to these and similar uses; to which perhaps should be added—if not included in the foregoing—restrictions in respect of apartment houses. *Specifically, there is nothing in the record to suggest that any damage results relating to churches,* schools, libraries and other public and semi-public buildings. *It is neither alleged nor proved that there is or may be a demand for any part of appellee's land for any of the last named uses;* and we cannot assume the existence of facts which would justify an injunction upon this record in respect of this class of restrictions. *For present purposes the provisions of the ordinance in respect of these uses may, therefore, be put aside as unnecessary to be considered.* It is also unnecessary to consider the effect of the restrictions in respect of U-1 [restrictions to single family dwellings, etc.] districts, since none of appellees' land falls within that class." (Emphasis supplied.)

(As pointed out above, in the case at bar it is alleged that plaintiff was the owner of land in the area specifically limited to single family dwellings and where churches were specifically excluded. A map of the entire city of Porterville was made a part of the complaint so that the exact relation of petitioner's land in the zoning scheme was before the Court. It was also alleged that plaintiff desired to construct a building for religious worship upon the premises and was denied a permit for the sole reason that the challenged ordinance prohibited the construction of churches

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on the property owned by the appellant. The allegations of the complaint were unchallenged and the demurrer to the complaint was sustained without leave to amend upon the specific ruling that the ordinance did not violate constitutional guaranties.)

The other decisions of this Court cited by the appellees in support of their argument of no substantial federal question do not deal with the question here presented. The case of *Zahn* v. *Board of Public Works*, 274 U. S. 325, involved denial of a permit to erect a business building in a district restricted to residential purposes. The case of *Radice* v. *New York*, 264 U. S. 292, involved a statute with respect to the employment of women in restaurants between the hours of 10:00 o'clock at night and 6:00 o'clock in the morning. The case of *Nectow* v. *Cambridge*, 277 U. S. 183, had to do with zoning bordering on railroad tracts as residential and in that case the Court held that the owner *was* unconstitutionally deprived of the use of his property.

The courts of last resort in the States of Texas, Arizona, Oregon, Nevada and Ohio have held against the validity of zoning ordinances where the ordinance results either directly or indirectly in the prohibition of churches in residential districts. The cases referred to are as follows:

City of Sherman v. *Sims* (Texas), 183 S. W. (2) 415, aff'g, 181 S. W. (2) 100;

Ellsworth v. *Gercke* (Ariz.), 156 Pac. (2) 242;

Roman Catholic Archbishop v. *Baker* (Ore.), 15 P. (2) 391;

State ex rel. Roman Catholic Bishop v. *Hill* (Nev.), 90 Pac. (2) 217;

State ex rel. Synod of Ohio v. *Joseph* (Ohio), 39 N. E. (2) 515, 138 A. L. R. 1274.

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We may refer particularly to the *State ex rel. Synod of Ohio* v. *Joseph*, 139 Ohio State, 229, 39 N. E. (2) 515. Said the court (39 N. E. (2) 520, Col. 2):

> "We seriously question the constitutionality of any enactment that seeks flagrantly to prohibit the erection of churches in residential districts."

In a note appended to the report of the foregoing case, which appears in 138 A. L. R. 1287, there is stated a summation of what we submit is generally regarded to be the law upon this subject and which appears to present the view, which the Supreme Court has apparently declared to be without substance. The note states:

> "In the relatively few cases in which the question has been considered, the view has consistently been taken that an administrative application of a zoning ordinance which operates to exclude the erection of church buildings in residence districts is invalid, either as violative of the due process and equal protection clauses of the state and Federal Constitutions, or as being an arbitrary and unreasonable enforcement of the ordinance."

Conclusion

We respectfully submit that the question presented on the appeal herein is a substantial federal question and is not so unsupported by law or reason as to be beyond the jurisdiction of the Supreme Court of the United States.

Wherefore petitioner respectfully petitions that its petition for rehearing be granted and that the order dismissing the appeal be vacated and set aside, and that probable jurisdiction be noted.

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BLEED THROUGH—POOR COPY

Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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